

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

SCOTT AND RHONDA BURNETT, RYAN)
HENDRICKSON, JEROD BREIT, SCOTT)
TRUPIANO, JEREMY KEEL, HOLLEE)
ELLIS, and FRANCES HARVEY, on behalf)
of themselves and all others similarly situated,)

Plaintiffs,)

v.)

THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF AMERICA,)
INC., BHH AFFILIATES, LLC, HSF)
AFFILIATES, LLC, RE/MAX, LLC, and)
KELLER WILLIAMS REALTY, INC.,)

Defendants.)

Case No: 4:19-cv-00332-SRB

Judge Stephen R. Bough

**DEFENDANTS' MOTIONS *IN LIMINE* NO. 2 TO EXCLUDE EVIDENCE RELATED
TO DISCRIMINATION IN THE REAL ESTATE INDUSTRY**

The undersigned Defendants respectfully move *in limine* for the Court to enter an order excluding all evidence or reference to discriminatory practices, policies, or actions in the real estate industry, including any effects of such actions and any apologies for such actions, such as the November 19, 2020 apology issued by NAR President Charlie Oppler.

ARGUMENT

NAR has reason to believe Plaintiffs may attempt to reference the prior policies during trial. Plaintiffs have previously introduced the prior policies during a deposition of one of Defendants' expert witnesses, David Stevens, and sought extensive questioning from Mr. Stevens regarding them. (Ex. A (Stevens Exhibit 1684); Ex. B (Stevens Dep. Tr. at 23:13-34:9).) Indeed, Plaintiffs' questioning on this topic continued for nearly ten pages of testimony, with Plaintiffs'

counsel referring to the apology with inflammatory language including “the sins of . . . the National Association of Realtor’s past.” (Ex. B (Stevens Dep. Tr. at 29:3-8)). Plaintiffs should be prohibited from any further attempt to bring this prejudicial topic into this case, to which it has no possible rational relation.

District courts have broad discretion to exclude evidence that is not relevant. *See Easley v. Am. Greetings Corp.*, 158 F.3d 974, 976-77 (8th Cir. 1998). Evidence is relevant if it has “any tendency to make a fact more or less probable than it would be without the evidence,” where “the fact is of consequence in determining the action.” FED. R. EVID. 401. “Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” FED. R. EVID. 401 advisory committee’s note to 1972 proposed rules. “Irrelevant evidence is not admissible.” FED. R. EVID. 402. The Court may exclude evidence, even if potentially relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. FED. R. EVID. 403; *McPheeters v. Black & Veatch Corp.*, 427 F.3d 1095, 1101 (8th Cir. 2005).

NAR’s public apology for policies and practices as long ago as the 1960s, and commitment to furthering fair housing access, certainly fits the criteria for exclusion. The prior policies have nothing whatsoever to do with a single claim or defense in this case and should be excluded on that basis alone. Even if this material were potentially relevant, which it is not, it is highly prejudicial to NAR as Plaintiffs can offer it for no purpose other than to paint NAR to the jury as a generally bad actor in the real estate industry. Any purported probative value of the prior policies is far outweighed by the prejudice to NAR, especially because the material is not “of consequence in determining the action.” *See* FED. R. EVID. 401. Courts in the Eighth Circuit exclude such highly prejudicial evidence of a defendant’s prior bad acts. *See Jenkins v. England*, No. 04-0966-

CV-W-FJG, 2006 WL 3391090, at *2 (W.D. Mo. Nov. 22, 2006) (granting unopposed motion to exclude evidence of “scandalous news items that have no relationship to the facts of [the] case”); *Dole v. USA Waste Servs., Inc.*, No. A3-94-25, 1995 WL 908700, at *1 (D.N.D. May 19, 1995) (excluding evidence of defendant’s prior criminal conviction where unrelated to claims at-issue), *aff’d*, 100 F.3d 1384 (8th Cir. 1996).

Moreover, a party may not introduce evidence of subsequent remedial measures when the evidence is offered to establish culpable conduct. FED. R. EVID. 407 (“When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove . . . culpable conduct[.]”) “Th[is] rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault.” FED. R. EVID. 407 advisory committee notes to 1972 proposed rules. As relevant here, “courts have applied this principle to exclude evidence of . . . changes in company rules.” *Id*; see *W. Plains, L.L.C. v. Retzlaff Grain Co. Inc.*, No. 8:13CV47, 2016 WL 165698, at *8 (D. Neb. Jan. 13, 2016) (excluding as inadmissible under Rule 407 evidence of a company’s change in language to its employment agreement to the extent it was used to show that the company “failed to take reasonable measures to protect its trade secrets”).

CONCLUSION

For the reasons stated above, the undersigned Defendants respectfully request that this Court order the evidence and arguments identified above be excluded, and further order that Plaintiffs, their witnesses, and any other person be prohibited from referencing or discussing such evidence or arguments in the presence of the jury.

Dated: August 24, 2023

Respectfully submitted,

/s/ Robert D. MacGill

Robert D. MacGill, *pro hac vice*
Scott E. Murray, *pro hac vice*
Matthew T. Ciulla, *pro hac vice*
Patrick J. Sanders, *pro hac vice*
MACGILL PC
156 E. Market St.
Suite 1200
Indianapolis, IN 46204
(317) 721-1253
robert.macgill@macgilllaw.com
matthew.ciulla@macgilllaw.com
scott.murray@macgilllaw.com
patrick.sanders@macgilllaw.com

Jay N. Varon, *pro hac vice*
Jennifer M. Keas, *pro hac vice*
jvaron@foley.com
jkeas@foley.com
FOLEY & LARDNER LLP
3000 K Street NW, Suite 600
Washington, DC 20007
(202) 672-5300

Brian C. Fries
bfries@lathropgale.com
LATHROP GALE LLP - KCMO
2345 Grand Avenue, Suite 2200
Kansas City, MO 64108-2618
(816) 292-2000

*Attorneys for HomeServices of America, Inc.,
BHH Affiliates, LLC, and HSF Affiliates, LLC*

/s/ David R. Buchanan

David R. Buchanan
dbuchanan@bjpc.com
BROWN & JAMES, PC-KCMO
2345 Grand Boulevard
Suite 2100
Kansas City, MO 64108
(816) 472-0800

Timothy Ray, *pro hac vice*
timothy.ray@hklaw.com
HOLLAND & KNIGHT LLP
150 North Riverside Plaza, Suite 2700
Chicago, IL 60606
(312) 263-3600

David C. Kully, *pro hac vice*
david.kully@hklaw.com
Anna P. Hayes, *pro hac vice*
anna.hayes@hklaw.com
HOLLAND & KNIGHT LLP
800 17th Street NW, Suite 1100
Washington, DC 20530
(202) 469-5415

Jennifer Lada, *pro hac vice*
jennifer.lada@hklaw.com
HOLLAND & KNIGHT LLP
31 West 52nd Street, 12th Floor
New York, NY 10019
(212) 513-3513

Dina W. McKenney, *pro hac vice*
dina.mckenney@hklaw.com
HOLLAND & KNIGHT LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1757

Counsel for Keller Williams Realty, Inc.

/s/ Ethan Glass

Ethan Glass (*pro hac vice*)
Samantha Strauss (*pro hac vice*)
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004-2400
(202) 776-2244
eglass@cooley.com
sastrauss@cooley.com

Beatriz Mejia (*pro hac vice*)
COOLEY LLP
3 Embarcadero Center, 20th Floor
San Francisco, CA 94111
(415) 693-2000
mejiab@cooley.com

Charles W. Hatfield (MO Bar # 40363)
Alexander C. Barrett (MO Bar # 68695)
STINSON LLP
230 W. McCarty Street
Jefferson City, MO 65101
(573) 636-6263
chuck.hatfield@stinson.com
alexander.barrett@stinson.com

*Attorneys for Defendant NATIONAL
ASSOCIATION OF REALTORS®*

/s/ Jeffrey A. LeVee

Jeffrey A. LeVee (*Pro Hac Vice*)
jlevee@jonesday.com
Eric P. Enson (*Pro Hac Vice*)
epenson@jonesday.com
Kelly M. Watne (*Pro Hac Vice*)
kwatne@jonesday.com
JONES DAY
555 Flower St
Los Angeles, California 90071
Tel: (213) 489-3939
Fax: (213) 243-2539

Eddie Hasdoo (*Pro Hac Vice*)
ehasdoo@jonesday.com
JONES DAY
110 N Wacker Drive, Suite 4800
Chicago, Illinois 60606
Tel: (312) 782-3939
Fax: (312) 782-8585

Danne W. Webb (MO #39384)
Andrea S. McMurtry (MO#62495)
HORN AYLWARD & BANDY, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
Telephone: (816) 421-0700
Facsimile: (816) 421-0899
Email: dwebb@hab-law.com
Email: amcmurtry@hab-law.com

Counsel for Defendant RE/MAX, LLC

/s/ Steven F. Molo

Karrie Clinkinbeard
ARMSTRONG TEASDALE LLP-KCMO
2345 Grand Boulevard, Suite 1500
Kansas City, MO 64108
Telephone: (816) 221-3240
kclinkinbeard@atllp.com

Steven F. Molo, *pro hac vice*
Eugene A. Sokoloff, *pro hac vice*
Pamela I. Yaacoub, *pro hac vice*
Matthew J. Fisher, *pro hac vice*
MOLOLAMKEN LLP
300 N. LaSalle St., Suite 5350
Chicago, IL 60654
Telephone: (312) 450-6700
smolo@mololamken.com
esokoloff@mololamken.com
pyaacoub@mololamken.com
mfisher@mololamken.com

Lauren M. Weinstein, *pro hac vice*
Robert Y. Chen, *pro hac vice*
MOLOLAMKEN LLP
600 New Hampshire Ave., N.W., Suite 500
Washington, D.C. 20037
Telephone: (202) 556-2000
lweinstein@mololamken.com
rchen@mololamken.com

Justin M. Ellis, *pro hac vice*
MOLOLAMKEN LLP
430 Park Avenue, Floor 6
New York, NY 10022
Telephone: (212) 607-8160
jellis@mololamken.com

Stacey Anne Mahoney, *pro hac vice*
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, NY 10178
Telephone: (212) 309-6000
stacey.mahoney@morganlewis.com

Kenneth Michael Kliebard, *pro hac vice*
MORGAN LEWIS & BOCKIUS LLP
110 N. Wacker Drive, Suite 2800
Chicago, IL 60606-1511
Telephone: (312) 324-1000
kenneth.kliebard@morganlewis.com

William T. McEnroe, *pro hac vice*
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Telephone: (215) 963-5000
william.mcenroe@morganlewis.com

*Counsel for Realogy Holdings Corp. (n/k/a
Anywhere Real Estate, Inc.)*

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2023, a copy of the foregoing document was electronically filed through the ECF system and will be sent electronically to all persons identified on the Notice of Electronic Filing.

/s/ Ethan Glass

Ethan Glass (*pro hac vice*)
1299 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004-2400
Phone (202) 776-2244
Fax (202) 842-7899
eglass@cooley.com

***Attorney for Defendant National
Association of REALTORS®***